United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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P/S

75-1216

To be argued by
T. GORMAN REILLY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1216

UNITED STATES OF AMERICA,
Appellee,

—v.—

ANTONIO REYES and BRUNILDA RODRIGUEZ,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Antonio Reyes and Brunilda Rodriguez appeal from judgments of conviction entered on June 6 and 20, 1975 in the United States District Court for the Southern District of New York, after a four-day trial before the Honorable Charles L. Brieant, Jr., United States District Judge, and a jury.

Indictment 74 Cr. 382, filed on April 11, 1974, charged the two appellants and five others—Ricardo Quiles, Victor Soto, Hector Soto, Santiago Medina and Joseph Cacciola—with various violations of the federal narcotics laws. In addition, the indictment charged Victor Soto and Hector Soto with unlawfully carrying a firearm during the commission of a felony, a violation of 18 U.S.C. § 924(c)(2).*

* Ricardo Quiles, Santiago Medina and Joseph Cacciola entered pleas of guilty prior to trial. Victor Soto failed to appear at trial and the case against him was severed. He is still a fugitive. Hector Soto withdraw his plea of not guilty after the opening statements and entered a plea of guilty to Counts 1 and 3.

Count One of the indictment charged all of the defendants with conspiracy to violate the federal narcotics laws from June 1, 1973 until April 11, 1974, the date of the filing of the indictment. Count Two of the indictment charged Antonio Reyes and Santiago Medina with a sale of 24.14 grams of heroin on September 17, 1974, in violation of 21 U.S.C. § 841(a)(1). Count Three of the indictment charged Antonio Reyes, Brunilda Rodriguez, Hector Soto and Ricardo Quiles with a sale of 14.66 grams of heroin on October 15, 1974, likewise in violation of 21 U.S.C. § 841 (a)(1). The remaining counts of the indictment charged defendants other than Reyes and Rodriguez with substantive violations of the narcotics laws (Counts Four through Seven) and the firearms law (Counts Eight and Nine).

Trial commenced on May 6, 1975. On May 9, 1975 the jury convicted Antonio Reyes on Counts One through Three and Brunilda Rodriguez on Counts One and Three. On June 6, 1975 Judge Brieant sentenced Antonio Reyes, who had been remanded following trial, to a term of twelve years imprisonment on each count, to run concurrently. On June 20, 1975 Judge Brieant sentenced Brunilda Rodriguez to a term of eighteen months imprisonment on both counts, to run concurrently. As required by statute, both defendants were placed on special parole for a period of three years to follow imprisonment. Antonio Reyes is in custody serving his sentence; Brunilda Rodriguez is at liberty pending appeal.

Statement of Facts

The Government's Case

In late April 1973 the New York Joint Task Force of the Drug Enforcement Administration (DEA) was provided with information from a reliable source * that Antonio Reyes was a trafficker in narcotic drugs. Police Officer Angel Rodriguez ** thereupon placed a telephone call to Antonio Reyes for the purpose of verifying the informant's statement. Angel introduced himself as the informant's brother and with little difficulty was able to make preliminary arrangements for the purchase of narcotics (Tr. 39-42). Because of other investigations, Angel and his fellow DEA officers were unable to pursue the matter further until several months later. In early July Angel telephoned and then met Antonio Reyes at the latter's apartment at 1800 Monroe Avenue in the Bronx. Their discussions led to the purchase of a sample of heroin on July 19, 1973 from one of Reyes' several "connections" (Tr. 43-47). Arrangements were made through Reyes to buy one ounce quantities of heroin from this connection, a person named Rafy and described by Reyes as his godfather (Tr. 47). The meeting, however, did not result in further sales of narcotics (Tr. 55).

When Angel telephoned again in September, Reyes said that he had lined up a connection who could deliver. Reyes stated that the connection could produce quality heroin at

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* The source of this information was Louis Lopez, at the time an inmate of the Federal Detention Headquarters. He was well acquainted with Antonio Reyes whose wife had once been Lopez' girl friend. Lopez had already provided the Warden of the Federal Detention Headquarters with helpful information on other matters (Tr. 123, 126, 128) (Citations to "Tr." refer to the trial transcript).

** To avoid confusion with the defendant Brunilda Rodriguez, Police Officer Rodriguez will be referred to hereafter as "Angel."

$1,300 to $1,400 per ounce (Tr. 56-57). As a result, Angel went to Reyes' apartment where he met Santiago Medina and bought from him an ounce of heroin, touted as "six-cut quality," * for $1,300. In addition, Angel paid Reyes $100 for his services in arranging the sale (Tr. 57-59). Although Angel attempted to deal directly with Medina, the latter insisted that all future deals be made through Reyes (Tr. 59). When Angel called Reyes a few weeks later he learned that Medina had been arrested. But, Reyes was quick to add, he knew people with the same connection (Tr. 63). Thus, Angel came to meet Brunilda Rodriguez.

On October 10, 1973 Angel went to Monroe Avenue to buy a further ounce of heroin. Upon his arrival, Reyes left the apartment, went across the street, picked up Brunilda Rodriguez, and returned to the apartment. Brunilda told Angel that her connection would supply "six-cut" heroin at $1,600 per ounce (Tr. 65-67). Although they were unable to complete a sale that evening they did so on October 15, 1973. Early that day Reyes called Angel to advise that contact had been made with the connection and that Angel should come to his apartment with the money. When Angel arrived at the apartment, Reyes once again went across the street to pick up Brunilda. A few hours later the three of them turned the corner on 175th Street, met up with Hector Soto and reached an agreement that Angel would buy one-half ounce of heroin that evening and a second one-half ounce the following day (Tr. 69, 73-74). Reyes, who did not appear to know Soto very well, stayed behind while Angel and Brunilda went with Hector Soto to his nearby apartment to get the drugs. Hector Soto went into the bedroom where he pulled out a one-ounce bag of heroin from a desk drawer. Angel noted the presence of Ricardo

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* Detective Rodriguez testified that "six-cut" heroin meant heroin that could be diluted six times in order to reach consumption level of strength (Tr. 58).

Quiles in the bedroom. After Hector Soto weighed out one-half ounce of heroin on a scale, Angel paid him $750 and at Soto's direction Brunilda carried the drugs down to Angel's car. For his efforts Reyes received $50 from Angel (Tr. 74-75). The following day Angel picked up the second half ounce from the Soto brothers, this time at the apartment of Victor Soto in a nearby section of the Bronx (Tr. 76). Angel returned to Victor Soto's residence on several occasions during the next few weeks. On October 26, 1973 he purchased two ounces of heroin which had been brought to the apartment by Ricardo Quiles (Tr. 86-89). On November 6, 1974 he returned on the pretext of buying two additional ounces from the Soto brothers. Again, Ricardo Quiles arrived with the heroin. Instead of purchasing the drugs, Angel and his fellow officers proceeded to arrest each of the co-conspirators. Joseph Cacciola, the man who was supplying Ricardo Quiles with the drugs, was arrested later that afternoon. Antonio Reyes and Brunilda Rodriquez were arrested late that night (Tr. 90-94). On the following day they admitted their involvement in statements to an Assistant United States Attorney (Tr. 186-190, 207-211; GX 12, GX 13).*

The Defense Case

Neither defendant testified at trial. Brunilda Rodriguez did not present a case. Antonio Reyes introduced a copy of the arresting officer's complaint filed before the Magistrate and then rested (Tr. 270-271).

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* Several other witnesses also testified for the Government. DEA Special Agent Joseph Flanneby and Police Officer William Petraglia described their observations as surveillance officers, the arrest of Reyes and Brunilda Rodriguez, and the incriminatory statements given by the defendants the following day to the Assistant United States Attorney. Joseph Barbato, a DEA chemist, testified as to the results of tests performed on the drugs purchased by the undercover officer from the defendants.

POINT I

The District Court properly denied Brunilda Rodriguez' claim that multiple conspiracies were proven.

In her brief, Brunilda Rodriguez contests her conviction under the conspiracy count only. She appears to concede the validity of her conviction under Count Three—and with good reason.* Her challenge to her conviction under Count One is that the indictment charged a single conspiracy whereas the proof showed the existence of three separate conspiracies, two of which she had no connection with. The evidence, however, supports a finding that there was but one conspiracy and that Miss Rodriguez was well aware of its scope. Further, even assuming the existence of three separate conspiracies, she was not prejudiced by the receipt of evidence relating to the earlier two transactions.

The single objective of the conspiracy charged in the indictment was to sell heroin to the undercover police officer, Angel Rodriguez. Angel's link to the other members of the conspiracy was Antonio Reyes. During each of the telephone calls between Angel and Reyes they discussed the purchase of narcotics. Reyes' only purpose in dealing with Angel was to discuss and deal in narcotics. By the time that Brunilda Rodriguez met with Angel in Reyes' apartment she had already seen him in the neighborhood together with Reyes. On October 1, 1973, when Angel learned that Santiago Medina had been arrested, Reyes assured him that he was lining up another connection with "some

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* The evidence shows that she communicated the terms of the sale to Angel—six-cut heroin at $1600 per ounce—, that she brought Angel to meet with her source, Hector Soto, that she accompanied them both to Hector Soto's apartment where the sale was made, that she carried the heroin down to Angel's car, that for her services she received payment in kind—a small amount of heroin from Hector Soto, and that she sought additional payment from Angel (Tr. 66-67, 73-75).

people with the same connection" who had been supplying Medina (Tr. 63-64; G.EX. 16). In another telephone conversation on the following day Reyes told Angel that his new connection—Brunilda Rodriguez—could supply heroin that was better than what Medina had supplied.* On

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* The transcript of that conversation which was received in evidence as G. EX. 17 reads, in part, as follows:

"Tony [Antonio Reyes]: Ah ha, listen, he told me that its something real good, understand.

UC [Under Cover]: Ah ha.

Tony: The proof and all you understand I think its better than Indio's [Medina].

UC: Ah ha.

Tony: The chic is one of those people.

UC: The same connection of Indio?

Tony: Understand, no another one near the house.

UC: O.K., but its something good?

Tony: Listen, yes.

* * * * *

Tony: You know who is going to do the deal with us...

UC: Who?

Tony: You know the chic that lives in front that you asked if she was good.

UC: Ah ha.

Tony: That one.

UC: O.K. but you trust . . .

Tony: That chic asked me if you go out.

UC: Ah ha.

Tony: If you go out?

UC: We do something also, after we trust.

Tony: You heard?

UC: Ah ha.

Tony: She asked me if you go out?

UC: Why she digs me?

Tony: That separated, yes.

UC: [Laughs].

Tony: That's your problem.

UC: I am only in business, only tell her.

Tony: I know, but I only tell you, you know.

UC: Yeah, fine.

Tony: Its no message—she sent you. That is something that she was speaking with me.

UC: Fine, tell her that I am in business only.

* * * * *

G.EX. 17, pp. 6-7.

October 10th when Reyes brought Brunilda to his apartment, Angel promptly told her that he was interested in buying good quality heroin to which her ready response was that she could get him "six-cut" quality for $1,600 (Tr. 66-67). Although Brunilda was unable to deliver the drugs that evening she did see the deal through to completion on October 15th (Tr. 67-75). On that date arrangements were made in her presence for further transactions between Hector Soto and Angel (Tr. 74). Given these facts it is difficult to take seriously a claim that Brunilda was unaware of any prior narcotics transactions involving Reyes and Angel and thus was ignorant of the scope of a larger conspiracy. As this Court has held on a number of occasions, the question of whether multiple or single conspiracies existed is a question of fact for the jury. *United States* v. *Dardi,* 330 F.2d 316, 327 (2d Cir.), *cert. denied,* 379 U.S. 845 (1964); *United States* v. *Crosby,* 294 F.2d 928, 945 (2d Cir. 1961), *cert. denied,* 368 U.S. 984 (1962); *United States* v. *Calabro,* 449 F.2d 885, 893 (2d Cir. 1971), *cert. denied,* 404 U.S. 1047 (1972). In this case, as Rodriguez appears to concede, the District Court gave a fully proper charge to the jury on the issue of single and multiple conspiracies (Tr. 364-366); indeed, the charge followed closely that given by the District Court in *United States* v. *Traumunti,* 513 F.2d 1087, 1108 (2d Cir. 1975), which this Court found to be "clear, correct and within the decided case". Id. at 1107.

Moreover, even assuming that three separate conspiracies—one involving Reyes and Rafy, a second involving Reyes and Medina, and a third involving the various sales made by the Soto brothers—were shown, there was no prejudice to Brunilda Rodriguez. Absent such prejudice the variance between the indictment and the proof at trial is of no consequence. *Berger* v. *United States,* 295 U.S. 78, 82 (1935); *United States* v. *Miley,* 513 F.2d 1191, 1207 (2d Cir. 1975); *United States* v. *Calabro,* 467 F.2d 973, 982-983 (2d Cir. 1972), *cert. denied,* 410 U.S. 926,

reh. denied, 411 U.S. 941 (1973); *United States* v. *Agueci,* 310 F.2d 817, 827 (2d Cir. 1962). The conspiracy which the defendant Brunilda Rodriguez concedes being a member of was proven and was a conspiracy charged in the indictment. The evidence of her participation in that conspiracy was ample * and there is no claim that hearsay emanating from the two earlier transactions was used to her detriment. *United States* v. *Miley, supra,* at 1208. As in *United States* v. *Miley, supra,* "this was not a case where a minor participant in one conspiracy was forced to sit through weeks of damaging evidence relating to another. The whole trial consumed but five days [in the case of Rodriguez, only four days] and the crimes of the various appellants were not markedly different." 513 F.2d, at 1209. Furthermore, the evidence was certainly admissible to show the background for the conspiracy and how it developed. *United States* v. *Torres,* Slip op. 4573, 4580 (2d Cir., July 2, 1975); *United States* v. *Papadakis,* 510 F.2d 287, 294 (2d Cir.), *cert. denied,* 43 U.S.L.W. 3584 (April 28, 1975); *United States* v. *Cohen,* 489 F.2d 945, 949 (2d Cir. 1973). Finally, appellant's argument that as a matter of law she was entitled to a dismissal of the indictment because of proof of seprate conspiracies is disposed of by this Court's holding in *United States* v. *Tramunti, supra,* 513 F.2d at 1108:

> "[W]here there was proof of the single, overall conspiracy, the fact that there was evidence adduced of other conspiracies or that the jury could have found two *major* conspiracies does not require a mandatory charge of acquittal."

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* Appellant's reliance on *United States* v. *Purin,* 486 F.2d 1363, 1369 (2d Cir. 1973) in support of a claim that she was at most a casual facilitator is not convincing. In *Purin* the Court found that the general proposition quoted in Appellant's Brief (p. 12) was not applicable to facts which showed the defendant to be knowing and willing participant in the sale of drugs. Here the evidence shows that Brunilda Rodriguez was a vital link between purchaser and seller.

Clearly, Brunilda Rodriguez was not prejudiced by the receipt in evidence of these two prior transactions especially where the major sales in the case involved her connection, the Soto brothers.

POINT II

The sentence of twelve years imprisonment imposed by the District Court on appellant Reyes is not subject to challenge.

The defendant Reyes' single issue * on appeal is that the sentence of twelve years imprisonment imposed by Judge Brieant is cruel and unusual and thus a violation of his Eighth Amendment constitutional rights. The sentence although rigorous is clearly not subject to appellate review.

The sentence imposed was within the fifteen year maximum provided by statute.** Although consecutive sentences for each of the three counts, totalling forty-five years, could have been imposed, the Court declared that the sentences were to run concurrently (Tr. 411). Absent any procedural irregularities in its imposition the sentence is not subject to appellate review. *Dorszynski* v. *United States,* 418 U.S. 424, 441 (1974); *United States* v. *Wiley,* Slip. Op. 5211, 5216-17 (2d Cir., July 29, 1975); *United States* v. *Tramunti,* 513 F.2d 1087, 1120 (2d Cir. 1975);

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* Counsel for appellant Reyes, citing *Anders* v. *California,* 386 U.S. 743 (1967), has concluded that "nothing appears in the record that might arguably support a good faith contention that the verdict of conviction was erroneous as a matter of fact or law" (Reyes Brief, 4).

** 21 U.S.C. § 841(b)(1) sets a maximum sentence of fifteen years, to be followed by a special parole term of at least three years. Although there is no upper limit to the special parole term that the Court can impose, *United States* v. *Simpson,* 481 F.2d 582, 583 (5th Cir. 1973), the District Judge here set a special parole term of only three years. 21 U.S.C. § 846 provides for a similar maximum sentence.

United States v. *Malcolm,* 432 F.2d 809, 814-15 (2d Cir. 1970). The cases cited by appellant do not stand for a contrary proposition. In *United States* v. *Schwartz,* 500 F.2d 1350 (2d Cir. 1974) a divided panel found that the District Judge had employed a fixed and mechanical approach to sentencing rather than a careful appraisal of all relevant variables. In *United States* v. *Rosner,* 485 F.2d 1213 (2d Cir. 1973) the Court held that the defendant was denied the opportunity to present any information on his behalf as provided for by Rule 32(a) of the Federal Rules of Criminal Procedure in being refused an adjournment to rebut a damaging probation report and the prosecutor's hard hitting sentencing memorandum, both of which documents had only been made available on the day of sentencing. In *United States* v. *Slutsky,* 514 F.2d 1222 (2d Cir. 1975) the case was remanded so that the District Judge could reconsider his sentence in light of guidelines which had been published by the United States Board of Parole in the interim. This last case merely emphasizes that "the parole implications of a sentence are a necessary and important factor for the consideration of the sentencing." *Id.* ct. 1229. Appellant's reliance on the Second Circuit Sentencing Study* is likewise misplaced. The focus of that study was *disparity* in sentences; it was not designed to determine what a "proper" sentence should be or whether sentences being imposed were unnecessarily severe or lenient. Partridge and Eldridge, *supra* at 14-17. Thus the fact that none of the forty-six judges participating in the study sentenced hypothetical defendant No. 3 (convicted of a narcotics offense) to a term of imprisonment in excess of ten years is of little significance. So, too, the sentences meted out to other defendants in the instant case are not controlling. This Court has properly stressed that a sentence should not reflect a fixed sentencing policy based on

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* Partridge and Elridge, *The Second Circuit Sentencing Study,* Federal Judicial Center (1974).

the category of crime rather than the individualized record of the accused. *United States* v. *Baker,* 487 F.2d 360 (2d Cir. 1973). Here, the District Judge was confronted with a chronic offender; this was the defendant's eleventh conviction in fourteen years * (Tr. 411). Accordingly a severe sentence was fully justified, and the exercise of discretion by the District Court should not be reviewed by this Court.

Successful challenges to sentences as being cruel and unusual in violation of the Eighth Amendment to the Constitution have been quite rare. *Furman* v. *Gerogia,* 408 U.S. 238 (1972) (5-4) [capital punishment]; *Robinson* v. *California,* 370 U.S. 660 (1962) [imprisonment for narcotics addiction]; *Trop* v. *Dulles,* 356 U.S. 86 (1958) [expatriation]; *Weems* v. *United States,* 217 U.S. 349 (1900) [twelve years in chains at hard and painful labor]. Courts have routinely upheld lengthy sentences under the federal narcotics laws when attacked as "cruel and unusual." *United States* v. *Ross,* 464 F.2d 376 (2d Cir. 1972); *United States* v. *Chou,* 398 F.2d 596 (2d Cir. 1968); *United States* v. *Simpson,* 481 F.2d 582 (5th Cir. 1973); *United States* v. *Kelley,* 476 F.2d 211 (1st Cir. 1973); *United States* v. *Scales,* 464 F.2d 371 (6th Cir. 1972); *United States* v. *Coduto,* 284 F.2d 464 (7th Cir. 1961); *McWilliams* v. *United States,* 394 F.2d 41 (8th Cir. 1941). In a recently decided case, *Downey* v. *Perini,* 17 Cr. L. R. 2324 (6th Cir., July 3, 1975), the Sixth Circuit (2-1) found that a mandatory minimum term of twenty years for sale of marijuana and a mandatory minimum term of ten years for possession of marijuana imposed by the State of Ohio violated the Eighth Amendment. That decision, although of questionable validity, is clearly inapplicable to a discretionary sentence of twelve years for repeated sales of heroin in significant amounts.

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* Appellant Reyes does not contend that the District Judge was unimformed as to his criminal record. See *United States* v. *Malcolm, supra.*

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

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Of Counsel.

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

T. GORMAN REILLY, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 3rd day of September, 1975 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

ABRAHAM SOLOMON, ESQ.
85 Baxter Street
New York, N. Y.

LAWRENCE LEVNER, ESQ.
521 Fifth Avenue
New York, N. Y.

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

T. Gorman Reilly

Sworn to before me this

3rd day of September, 1975

Jeanette Ann Grayer

JEANETTE ANN GRAYER
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Commission Expires March 30, 1977